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Universal C.I.T. Credit Corporation v. Rex L. Sohm and Kathryn Sohm et al : Brief of Respondent

Utah Supreme Court

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Keith E. Sohm; Attorney for Respondents;

Barker & Ryberg; Attorney for Appellant;

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

UNIVERSAL C.I.T. CREDIT COR-
PORATION,

Plaintiff,

vs.

REX L. SOHM and KATHRYN
SOHM,

Defendants and Respondents,

vs.

RICHARD H. NICKLES, dba ZION
MANAGEMENT,

Third Party Defendant and Appellant.

FILED
JUL 19 1963

Supreme Court, Utah

Case No.

9865

UNIVERSITY OF

BRIEF OF RESPONDENT

Appeal From the Judgment of the Third Judicial
District Court for Salt Lake County,
HONORABLE JOSEPH G. JEPPSON, *Judge*

00129

LAW LIB

KEITH E. SOHM,
65 East 4th South,
Salt Lake City, Utah,
Attorney for Respondents.

BARKER & RYBERG,
68 East 21st South,
Salt Lake City, Utah,
Attorney for Appellant.

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BRIEF OF RESPONDENT

NATURE OF THE CASE

On page one of his brief the appellant sets forth quite accurately the nature of the case and its disposition in the lower court. The lower court found correctly that appellant, Richard H. Nickles, and his employee made fraudulent misrepresentations to the Respondents, Rex L. and Kathryn Sohm and properly entered judgment against appellant from which appeal is now before the court.

STATEMENT OF FACTS

In the year 1960, appellant operated a business in Salt Lake City, Utah, under the name of Zion Management. He sold a product called the "Westinghouse Speed-O-Light Electronic Range" (R. 11, 135).

Nickles employed a woman, Patricia Strong, to demonstrate the range to prospective customers and did so during the months of June and July, 1960 (R. 157). She made a demonstration and an oral presentation to prospective customers. For the demonstration she would cook a piece of bacon, a piece of weiner and boil water (R. 134). On June 28, 1960, she made such a demonstration to respondents who went to appellant's place of business to investigate the Electronic Range (R. 54, 55). Mr. Sohm is an architect and interested in new ideas especially since he was planning to build a new home (R. 64). In connection with this demonstration Patricia Strong made numerous representations about the Electronic Range which are discussed in Argument, Point I. After talking to the demonstrator, respondents talked briefly to an unidentified man and was then ushered into Mr. Nickles' office who reiterated many of the representations made by Mrs. Strong and added a few as discussed in Argument, Point I. Believing the representations to be true and in reliance on them the respondents agreed to purchase the range (R. 65).

The unit was delivered and installed on or about July 3, 1960, (R. 67) by people retained by appellant for that purpose (R. 143). The respondents left on vacation and were gone about a week so did not begin using the range

until about July 10, 1960 (R. 82). While on vacation they talked to a sister and brother-in-law and made their only referral which resulted in a sale of a range to the Max Moffetts on or about July 14, 1960 (R. 170).

After the respondents commenced to use the range they found it would not do many of the things as represented as set forth in Argument, Point II. Mrs. Sohm complained to Nickles numerous times and even wrote to Westinghouse on his suggestion (R. 83, Ex. 7) without success. After talking to Nickles Mrs. Sohm tried to follow recipes and give the range a fair chance. She also tried using it without the other units as Nickles continued to maintain could be done. She tried for a month or two but had to revert back to her other units (R. 83).

It could be used for limited things like hot dogs, bacon, baked potatoes (if carefully picked for size, R. 108, 109), hamburger or for warming over left overs but other things were not satisfactory (R. 84).

A similar experience with similar representation was had by a witness called by respondent, Mrs. LaVerda Peterson (R. 90-98). The testimony of Mrs. Peterson was presented under the belief that her purchase of a range was made January 11, 1960 (R. 89) when, in fact, it was purchased in January, 1961. Over objections of respondents the testimony of this witness was stricken from the record (R. 100). Respondents contend it should be allowed to stand for two reasons: that it is corroborating testimony showing Nickles was making the same representations six months later despite being made aware of the limitations

by Sohms (R. 98) and that it is corroborating testimony to show performance of the range was unsatisfactory and not as represented.

Thereafter, respondents stopped making payments to Universal C.I.T. Corporation, and as a result this action was initiated on January 23, 1962.

ARGUMENT

POINT I.

THERE IS AMPLE EVIDENCE TO SUPPORT FINDING THAT FRAUDULENT MISREPRESENTATIONS WERE MADE BY APPELLANT AND HIS EMPLOYEE WHILE IN THE CONDUCT OF SAID EMPLOYMENT INTENDED TO AND DID INDUCE RESPONDENTS TO PURCHASE A WESTINGHOUSE ELECTRONIC RANGE.

There is no dispute about the First Finding that Appellants sold the range to Respondents on or about June 28th, 1960. The Second Finding is as follows:

“2. Said Third Party Defendant (Appellant) and his agents, in order to sell said Electronic Range to Third Party Plaintiff (Respondents) made the following representations of an existing fact:

“A. That the Electronic Range would do anything a regular oven and surface unit would do and that no other unit would be necessary except for a griddle for cooking hot cakes.

"B. That the Electronic Range would fry eggs, bake bread, cook breakfast cereal, and can fruit.

"C. That the cooking could be done in regular tableware including Melmac" (R. 40, 41).

The law applicable in this case is that stated in *Greenwell v. Duvall*, 9 Ut. 2nd 89. This is more recent case than *Pace v. Parish* referred to by appellant. This case holds as follows:

"Most of such cases involve the setting aside or modification of a written instrument. In order to do that, whether on the grounds of fraud, mutual mistake, lack of mutuality or for other reasons the grounds must be established by clear and convincing evidence. Such cases have little weight in establishing that a fraudulent representation which does not involve setting aside or modifying a written instrument must be established by clear and convincing evidence. Many cases hold that only a preponderance of the evidence is necessary to prove a fraudulent representation which does not involve the setting aside or modification of a written instrument."

In this case, however, as in the *Greenwell* case the court need not decide this question of evidence for, as we will show, there is clear and convincing evidence of fraud.

IN SUPPORT OF THE FINDING NO. 2A:

"That the Electronic Range would do anything a regular oven and surface unit would do and that no other unit would be necessary except for a gridle for cooking hot cakes." We submit the following:

There does not appear to be any substantial contention either in the appellant's brief or in the record that such

a representation was not made, in fact, the record would almost indicate that no exception was made since the demonstrator did not remember limiting the use of the range in regards to hot cakes, in fact, said she cooked them (R. 159). Respondents advised the demonstrator and Mr. Nickles of the size of their family as being six (R. 58).
 DEMONSTRATOR'S STATEMENTS AS TOLD BY WITNESS MRS. SOHM:

The range would cover all of the cooking needs of respondent's family, and they would not need any other unit (R. 56).

That the range would cook anything that respondents used for their family (R. 57).

"A. I recall that I asked about putting up fruit, because if I didn't have a range top how would I put the fruit up.

"A. She said, 'Well this covers all of the cooking needs'. She said, 'I don't know exactly in regard to putting up fruit, but I will get the information for you. I am sure that if it performs all of the cooking needs that it will do that also' (R. 58)."

The demonstrator's doubt was not whether it would can fruit but as to the procedure.

Question to Demonstrator: "Did you ever have anyone ask you if they could take out their regular cooking units and use your electronic range instead.

"A. Gosh, I don't — I couldn't answer specifically. I couldn't really recall (R. 163)."

NICKLES' STATEMENTS AS TOLD BY WITNESS
 MRS. SOHM:

After talking to the demonstrator they were introduced to a gentleman who asked them if they would like to purchase an oven:

“and we said, ‘If it performs — if it is the unit they claim, it would be a wonderful unit to have, and we will talk to Mr. Nickles.’ We went to see Mr. Nickles and he talked to us further about the oven (R. 63).

“Q. What did he say then in regard to the oven?

“A. We were concerned about its performing and meeting the needs of our cooking, and he said that it would meet all of the needs of our cooking, so far as regarding the frying and baking and boiling (R. 63).

He said he had an oven in his home and were thrilled with its performance (R. 63).

That it cooked everything and was used in their family and cooked everything that they needed cooked (R. 63, 64).

He emphasized that ‘this is all you need for your cooking’ when asked again if other cooking units were necessary (R. 64).

The respondents told Nickles that they were planning to build a new house and would plan on using this unit if they purchased it. And again Nickles said it would be the only unit they would need for cooking (R. 64, 65).

Mr. Nickles admits telling the Sohms that all of the other cooking units could be taken out and were not necessary with the exception of a small service unit for cooking pancakes (R. 138) and also

admits having told the Sohms that the electronic range would cook the various components of a meal in a matter of minutes (R. 139).

I call the honorable court's attention to the answers of Mr. Nickles on cross examination where he repeatedly made statements completely contradictory to the testimony of other witnesses or, in lieu thereof, equivocated and avoided answering (R. 139-142). The same course of conduct was followed by the appellant in answering admissions and interrogatories (R. 25, 26, 27), to which respondents objected in their motion to require answers (R. 28).

He denied telling Mrs. Peterson that the electronic range would be all she needed and denied knowing that the electronic range would be all she would have at her house to cook with (R. 140), despite Mrs. Peterson's testimony to the contrary (R. 90, 91). Some progress was made with this witness when Nickles did state that they made a practice of telling people about the limitations but ended up admitting the only limitations he knew of or would tell people about was that it would not cook pancakes (R. 141-143). After a little deliberation Nickles added the making of taffy to the list of things it would not do. At first he stated it would fry eggs but ended up admitting it would not really fry eggs (R. 144).

IN SUPPORT OF THE FINDING NO. 2B—"That the Electronic Range would fry eggs, bake bread, cook breakfast cereal and can fruit." The record is replete with evidence that such representations were made.

THE DEMONSTRATOR'S STATEMENTS AS TOLD
BY WITNESS MRS. SOHM:

The range cooked whole wheat breads, rolls and cookies efficiently. A whole wheat recipe would have to be obtained from the company but that it would bake bread (R. 55, 56).

The electronic range could be used for cooking whole grain mush (R. 57).

That it would meet all of our needs in frying and baking and boiling (R. 63).

I don't know exactly in regard to putting up fruit, but I will get the information for you. I am sure if it performs all of the cooking needs that it will do that also (R. 58).

That it could put a roast in, and surround it with potatoes and carrots and it would cook within a matter of moments (R. 60).

On cross examination the demonstrator was reluctant to state what she said in her presentation but answered as follows:

"Q. Did someone ask you, 'Can you bake bread in this oven — this electronic range', what did you tell them?

"A. I said, 'Yes'.

"Q. If I asked you, 'Can you cook fruit in this electronic range', what is your answer?

"A. I believe I said 'Yes' to that also (R. 162).

"Q. Did you tell them they could fry foods in this electronic oven?

"A. Yes, we fried bacon that night.

"Q. Did you tell them they could fry eggs in the electronic range?

"A. I don't believe — I don't remember telling them that, but I have done it.

"Q. You may have told them that?

"A. I may have done, I don't remember specifically (R. 162).

"Q. Did you tell that they could cook a whole meal in a matter of minutes?

"A. Yes.

"THE COURT: About boiling potatoes, could you tell me anything about that?

"A. Not specifically. In the course of the demonstration I would tell the people they could cook their vegetables in there (R. 164)."

It appeared she had not tried boiling potatoes in any quantity (R. 164).

"Q. Did you tell these parties they could cook cereal in the electronic range?

"A. I probably did, because according to my information you could cook cereal (R. 165).

"THE COURT: It wouldn't bake bread.

"A. I haven't baked bread in it.

"A. I did not cook any bread products, cake, yes (R. 167).

"Q. Did you have trouble cooking cereal?

"A. I did not cook it" (R. 168).

MR. NICKLES' STATEMENTS AS TOLD BY WITNESS, MRS. SOHM:

It would meet all of the needs of our cooking, so far as regarding the frying and baking and boiling, and we went over details in regards to cooking (R. 63).

We asked him about baking, and cooking for the family, and he said that it cooked everything and they used it in their family. I said I had four children. He said they had a small family, but it was very efficient for their use, and cooked everything that they needed cooked (R. 64). At the time we were in his office we were assured it would cover all our cooking needs in regards to frying, baking and cooking (R. 65).

We were told by Nickles and also the demonstrator that we could — it would cover all of these needs — our cooking needs completely (R. 65).

IN SUPPORT OF FINDING NO. 2C—"That cooking could be done in regular tableware including melmac"—the following representations were made:

"The demonstrator said they could take dishes right off the table and put food in the electronic range, and put it back on the table and eat from it. When asked about Melmac, the demonstrator said, 'Perfectly all right' " (R. 55).

On cross examination the demonstrator said:

"Q. Did you tell them they could use any type of dishware in the electronic oven?

"A. Yes (R. 162).

"Q. Did you ever cook on Melmac?

"A. No, I did not.

"Q. In the literature you got from Westinghouse was there any representation you could use Melmac or other types of dishware?

"A. No, there was not."

Thereafter the respondents, believing the words of Mr. Nickles and the demonstrator, and relying on them agreed to purchase the range. They would not have purchased the range if they had not believed the representations were true (R. 65).

The electronic range was purchased on a note calling for the payment of \$1613 based on an actual purchase price from appellant of \$1195 (R. 66, Ex. 2, 5).

POINT II.

THE RESPONDENTS RELIED ON THE REPRESENTATIONS TO THEIR DAMAGE, THAT THEY WERE FALSE AND THAT THE TRIAL COURT DID NOT ERR IN ITS FINDINGS AND IN GRANTING JUDGMENT IN FAVOR OF THE RESPONDENTS AGAINST APPELLANT.

There is more than ample evidence that the representations were false.

RESPONDENT'S EXPERIENCE:

Would not fry eggs, it would only bake them. They were not palatable and no one cared for them. They were drier and hard and did not have the flavor a fried egg has (R. 68).

The egg was on the rubbery side. It had yellow exposed and very little white on it — the yolk was dried (R. 69).

I attempted to fry pork chops and hamburger, but they were more or less baked also. The pork chops came out dry and unpalatable (R. 69).

They had to buy only certain cuts of meat. Regular cuts would not cook through and it took too long to cook. Steaks were dry and unsatisfactory (R. 70).

Baked cookies were not good. They were very dry, and trying to brown them made them even drier (R. 70).

Bread would not raise or bake (R. 70). It was dry and hard (R. 71).

I tried to cook mush and in the proportions we needed for a family, it kept boiling over. I kept getting a larger dish and it kept going over. There was no way of turning the unit down low enough to cook that — low enough to keep it from boiling over. It kept boiling over in my oven and then burn (R. 71).

I tried to boil potatoes, the larger quantity of potatoes I put in, the more difficult it was to boil. The water just boiled over and I could not find a large enough container to boil my potatoes in it. I couldn't cut the heat of the oven down sufficiently to keep it from boiling over (R. 73).

Couldn't cook whole dinners (R. 73).

Cooking green beans was difficult. They would not cook through. Also making chili, or cooking dry beans. They never did get done. They were not palatable, they were just hard, and especially the kind, if they were hard (R. 74).

Anything that didn't have moisture in the food, wouldn't cook, anything dry. If you put in macaroni or spaghetti in the water in the oven, it didn't cook (R. 74).

Not satisfactory for party groups (R. 75).

The range could not cook mush, bake bread, bake cookies or fry eggs (R. 82).

NICKLES' STATEMENTS:

On examination by the Court, Nickles admitted the Electronic Range would not "cook any food that is the result of a cooking technique. It would not make taffy" (R. 153).

"THE COURT: You do not get fried eggs out of the equipment?

"NICKLES: No, sir.

"THE COURT: What else wouldn't it do, besides fry eggs, cook pancakes and make taffy?

"NICKLES: It wouldn't cook food, some food as we are accustomed to preparing them" (R. 144).

In response to Court questions the witness tried to find a recipe for bread but all of the recipes appeared to be for rolls or cakes or muffins (R. 145, 146). Mr. Nickles had to admit there were no conventional recipes for bread and that none of the referred to products had yeast in them (R. 146). The witness began to hedge at specific questions about cooking and finally admitted he did not know anything about its cooking processes and did not know what it would or would not do (R. 148).

Mr. Nickles did not remember telling Mrs. Sohm that he did not think the unit in his own home was satisfactory

and did not recall saying the range was made "to be sold and not to be used". The question was put to Mrs. Sohm if she heard the statement to which she responded:

"Yes, right after we had our depositions at this lawyer's office, and he said, 'Since this is off the record — I said are you using your electronic range right now?' and he said — he laughed and said, 'No they are to be sold not to be used' " (R. 153).

Mrs. Peterson had a similar experience, bread was like rocks (R. 93). Potatoes would boil over (R. 94). Westinghouse demonstrator said it definitely could not bake bread (R. 97).

Mrs. Sohm tried over long periods of time to use it. Would call Nickles then try carefully to follow recipes as he suggested but it was completely unsatisfactory (R. 83).

Respondents even wrote to Westinghouse several times with no success (R. 76, 77).

The unit was checked and proved to be in proper operating condition (R. 111, 122).

Nickles said it was a revolutionary method of cooking and would save hours in the kitchen (R. 108). Respondent's experience was that because of the quantity of food to be cooked for their family (six all together) it took about the same length of time as a conventional set of cooking units (R. 108). Respondent tried to follow the range menus including putting meat in first and then other items but this did not work satisfactorily (R. 108). Attempts to cook twelve potatoes for Thanksgiving dinner showed that it

took as long or longer to cook in electronic range than in conventional oven. If some were small they were overdone while larger potatoes were not quite done (R. 108). The small potatoes were very dry and hard on the outside — dehydrated (R. 109). Peas would be burned while potatoes were still uncooked (R. 108, 113). They could not be cooked as represented (R. 113). It was a big headache to open and shut the door trying to take things out and in. By the time some foods were done and put aside to get something else done the ones put aside were cold (R. 113).

As to the Melmac, Exhibit 6 is a plate which shows clearly that Melmac was not usable in the oven as represented. It was removed from the oven before it was too badly burned (R. 72).

CONCLUSION

The respondents believed the words of Appellant and his employee and in relying on them purchased the range (R. 65). No question is raised concerning the measure or amount of damages but the record shows that Respondents paid a total of \$403.35 in payments to C.I.T. on the loan and mitigated further damages by settling with C.I.T. at a figure of \$325 balance after giving timely notice of their intent to appellant (R. 30) for a total loss of \$728.35 (R. 41, 77).

The lower court summed up the key problem here in its discussion with opposing counsel when it stated:

“The statement is, ‘This will do anything an ordinary stove with surface unit and oven will do.’ If they take the stove home and find out it won’t

fry eggs, bake bread, wouldn't cook pancakes, you have got a misrepresentation. You can do enough things to cook a meal on a stove that costs a few dollars, but if you are going to pay \$1600 you want one really to do something" (R. 167).

The statements in question here are not mere puffing particularly when considering the cost of the range involved herein. The representations referred to herein were deliberately calculated statements dsigned to convince the respondents they were getting something more than a mere stove but a product worth \$1600 or some \$1300 more than value of other ranges new. This took high powered sales techniques, the appellant knew it and did not hesitate to make whatever statements he felt necessary to make the sales.

In answer to the court's questions witness Nickles repeatedly stated he did not know what the range would or would not cook and did not know what was in the Westinghouse literature (R. 147, 148). And yet he made the many representations referred to in Argument No. I in a deliberate, well calculated manner. If he did not know the representations were untrue he should have known and should not have stated them recklessly without ascertaining their truthfulness. This agrees with his answer to admissions where he was asked if he was given literature and knew the limitations of the Electronic Range before the sales program commenced and he answered "No" (R. 19, 25).

The Appellant cannot excuse himself by saying that he only said what Westinghouse said. The Westinghouse literature and this record is devoid of evidence to show

Westinghouse said the range could do any of the things represented in Finding Number 2. Counsel for Appellant has not succeeded in so showing anywhere in his brief.

The Appellant tries to make something out of the fact that the Sohms recommended the unit to relatives, the Moffetts, who made a purchase also but this argument was discounted entirely when it was determined that the purchase date of Moffetts was July 13 or July 14 (R. 156). Clearly before the Sohms had a chance to use their unit more than a few days since their return from vacation about July 10.

Counsel for appellants tried to show that respondents discovered these limitations and yet kept the oven (R. 115, 116) but respondents indicated they felt they had to keep it because of the contracts and were told by Mr. Nickles and C.I.T. that they would do nothing, that we had signed a contract, were obligated and that was that.

The Restatement of Torts, Vol. 3, Secs. 525, 527, and 529 clearly state the law applicable in this case:

“No. 525. One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction is liable to the other for the harm caused to him by his justifiable reliance upon the misrepresentation.

“No. 527. A representation in a business transaction which the maker knows to be capable of two interpretations, the one false and the other true, if made with the intention that it be understood in the

sense in which it is false is a fraudulent misrepresentation.

"No. 529. A statement in a business transaction which while stating the truth so far as it goes, the maker knows or believes to be materially misleading because of his failure to state qualifying matter is a fraudulent misrepresentation.

"Comment (a) A statement containing a half truth may be as misleading as a statement wholly false. A statement which contains only those matter which are favorable and omits all reference to those which are unfavorable is as much false representation as if all the facts were untrue."

23 Am. Jur., Fraud and Deceit, Sec. 76-83 says:

"Half truths are sometimes worse than a lie and when a person makes a material representation concerning the property involved or his intentions in regards thereto, he must speak the whole truth, and a suppression of a part of the fact is fraud when made to induce a person to act to his damage. A half truth spoken with a design of influencing the opposite party to act where he has not an equal means of knowledge is of itself fraudulent."

In this case the appellant had an Electronic Range in his own home (R. 64) and had been connected with demonstration in his own office (R. 54, 55, 160) and had a demonstrator who had experimented considerably with the Range (R. 164, 165). He knew of its limitations and weaknesses and yet withheld this information and stated half truths as well as making bold false statements in order to accomplish the sale.

Pace v. Parrish, 122 Utah 141, 145, clearly sets out the elements of fraud and emphasizes an alternative to the 4th element "which representor either (a) knew to be false or (b) made recklessly, knowing he had insufficient knowledge upon which to base such representations." Either alternative could apply to appellant.

Hull v. Flinders, 83 Utah 158, 164, 27 P. 2d 56, 58, further emphasizes this well established Utah Law. In this case the defendant represented the company to be a big company with assets of from \$75,000 to \$100,000; that it was as safe as any bank in Ogden, and its bonds were as good as gold coin of like amount. The court held that while some of the statements were matters of opinion yet some were:

"Representation of fact, and, if untrue, and known by the officer at time to be untrue or made with reckless disregard of truth furnished grounds for an action in deceit."

The *Hull* case also gives us clearly the Utah law as to relief for fraud:

"The rule is well settled that one who has been induced, through fraud, to enter into a contract has the election either to rescind, tendering back that which he has received, or, affirming the contract, he may have his action for deceit to recover the damages sustained."

The Range in this case was regularly tendered back to appellants (R. 11, 30, 127).

The Court should consider this case in the same light as the Court did in the *Greenwell v. Duvall* case, 9 Utah 2d 89, 93, 338 P. 2d 118, where it stated:

“Only a glowing picture of a fleeting chance to make some money would induce an ordinary business man to make such an investment so quickly. That such a picture was represented to plaintiff by defendant is in full accord with plaintiff’s testimony and actions, though contrary to the testimony of the defendant.”

We agree with the fundamental elements required to prove fraudulent statements and submit respectfully that we have met the test in this case in showing that these were representations of an existing fact; that the statements were false; that they are material statements; that the defendant had knowledge or should have known they were false and nevertheless, recklessly and with intent to induce the purchase made the statements; that respondents relied on the representations and were ignorant of their falsity and, in fact, had a right to rely on them as being true; they acted upon this reliance and were injured as a consequence. *Pace v. Parish*, 122 Utah 141.

Respectfully submitted,

KEITH E. SOHM,

Attorney for Respondents.